NO. 56451-3-II

**COURT OF APPEALS, DIVISION II**
**STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

BARRETT JONATHAN MYERS,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Elizabeth Martin

No. 19-1-03755-7

# BRIEF OF RESPONDENT

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## I. INTRODUCTION

The Defendant correctly notes the trial court failed to enter written findings of fact and conclusions of law following a CrR 3.5/3.6 hearing. Remand is not necessary however because the record is sufficient for appellate review.

The Defendant also suggests an off-duty police officer working as private security cannot investigate a driver driving with a suspended license, which he admits is a misdemeanor crime. However, the officer had no other suspicion about or interest in the vehicle. The officer did not know who the occupants was, and there was nothing suspicious about the vehicle driving on the roadway until a Department of License and Records check revealed the owner of the vehicle had a driving with license suspended in the third degree. The officer's action was justified by probable cause and was reasonable in scope.

The defendant also takes issue with the timing of the deputies *Ferrier* warnings, suggesting the timing made the

consent coerced, and advising the defendant he would impound the vehicle was also coercive. Neither claim is correct. The search at issue was of a vehicle, not a home, and *Ferrier* warnings are not required to search of a vehicle. Thus, the timing of the deputy providing the warnings is irrelevant. Finally, telling a person of law that enforcement can obtain a warrant is not coercive and does not invalidate consent where law enforcement has a legal basis for requesting a warrant.

## II. RESTATEMENT OF THE ISSUES

A. Was the failure to enter written findings of fact and conclusions of law harmless when the record contains oral rulings from the trial court that are sufficient for an appellate court to review its decision to deny Defendant's motion?

B. Did the court properly deny the motion to suppress where the officers' investigation was not pretextual but based on reasonable articulable suspicion of misdemeanor driving with a suspended license?

C. Was Defendant's consent voluntary where there was no coercion and where the officer provided *Ferrier* warnings, even though not required, and Defendant reiterated their consent to a search of the vehicle, as well as the lock box?

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## III. STATEMENT OF THE CASE

### A. Facts of the Traffic Stop and Consent to Search

On October 3, 2019 at approximately 2:00 a.m., Defendant Myers was driving a white Kia when they were pulled over by law enforcement for driving with a suspended license in the third degree. During the stop, Deputy Crawford discovered hypodermic needles, approximately 26.5 grams of suspected heroin (to include packaging) in a plastic bag, 102.5 grams of suspected heroin (to include packaging) in a rubber container, a digital narcotics scale, a large number of plastic baggies, two plastic drug baggies containing suspected methamphetamine, and fentanyl test kit amongst other items. CP 1-3. They were charged with possession of a controlled substance with intent to deliver, second-degree possession of stolen property, third-degree possession of stolen property, and third-degree driving with license while in suspended or revoked status. CP 4-6. The state voluntarily dismissed count 4, driving with license while in

suspended or revoked status on grounds of judicial economy. CP 46-47.

The defendant attempted to suppress the evidence under a claim of pretextual stop and the failure of law enforcement to provide timely *Ferrier*[1] warnings. CP 17-27 & 37-45. Following a hearing and argument of counsel, the court denied the motion. RP 21-68; 75-78 (Testimony); RP 79-108 (Argument/Oral Ruling). Defendant proceeded to trial where they were convicted as charged of possession of a controlled substance with intent to distribute. CP 125, 228. The trial court dismissed both theft counts for insufficient evidence. CP 133-134. Defendant renews their suppression argument on appeal.

At the suppression hearing, one witness testified: Deputy Bradley Crawford with the Pierce County Sheriff's Office.

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[1] *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998)(Requiring law enforcement to advise a person they can refuse consent for law enforcement to search their residence without a warrant at anytime, and can limit the scope of the consent to certain portions of the residence).

RP 2. The deputy testified they were working off duty for the English Ridge Homeowners Association (HOA) performing security which entailed driving through the neighborhood, and surrounding areas, to deter criminal activity. RP 24, 42. One entrance to the English Ridge neighborhood is 131st Street East and Woodland Avenue East. RP 49. The deputy was wearing their department issued uniform and driving their fully marked department issued patrol vehicle equipped with lights and siren. RP 24-25.

From Woodland Avenue, the deputy saw a white Kia Optima traveling westbound on 112th Street. RP 26. Without knowing anything about the vehicle or occupant, the deputy ran the license plate through the Department of License and Records (DLR) from the computer in their patrol vehicle. RP 26. The return showed the vehicle was registered to the Defendant and that their driver's license status was "DWS third." RP 26. The deputy testified it is a misdemeanor crime to operate a vehicle with a suspend license on a public roadway. RP 26. The return

showed the defendant's photograph. RP 26. To confirm the driver matched the photograph on the return, the deputy drove alongside the vehicle and confirmed the match. RP 26. At that point, the deputy activated their emergency lights and performed a traffic stop and advised the defendant they were being detained for driving on a suspended license. RP 26-27. Deputy Crawford testified that if the vehicle's license plate had not come back as driving with license suspended, "I wouldn't have had a reason to" stop the defendant. RP 77.

Defendant was instructed to exit their vehicle and placed in handcuffs. RP 27. In plain sight were hypodermic needles in the driver door panel. RP 27. Defendant admitted to using those needles to ingest methamphetamine earlier. RP 28, 30, 57. Defendant waived their Miranda rights. RP 28. The deputy inquired about a warrant arrest associated with the vehicle and defendant explained it pertained to a female with the name Zweeg. RP 30.

The deputy asked for consent to search the defendant's car and he provided consent, with the exception of a lock box under the front passenger seat. RP 30-31. The deputy stated their intent to impound the vehicle and apply for a search warrant, at which time defendant consented to a full search of the vehicle and lock box. RP 31, 59-60. After obtaining consent to search, the deputy read defendant their *Ferrier* warnings. RP 33. Defendant reiterated their consent to the full search. RP 33. Defendant was allowed to stand near the vehicle with a full view of the search "so that he could observe the search and invoke their rights at any time . . . which he did not." RP 33. The deputy searched the vehicle including the lock box, unlocking the box with the key located on defendant's key chain which was in the ignition of the vehicle. RP 33. During the search of the vehicle and lock box, the deputy located large quantities of heroin and other items associated with the delivery of heroin. RP 34-35; CP 4.

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## B. Trial Court's Oral Ruling

Based on testimony of Deputy Crawford and argument of counsel, the court made its oral ruling and held the traffic stop was not pretextual and defendant did consent to a search of the vehicle and contents. RP 105-108.

Regarding the argument the stop was pretextual, the court explained it reviewed the relevant caselaw and defendant's case was not one involving an alleged traffic citation such as a broken taillight or improper muffler. RP 105. Rather, the deputy ran defendant's license plates, determined it was registered to the defendant, who did not have a valid driver's license because it was suspended, and the deputy verified prior to stopping the defendant that they were the person operating the vehicle. RP 105. Driving with a license suspended is not a pretext but is a misdemeanor. RP 105. The deputy, while off duty, was in their police uniform and in a marked police vehicle. RP 106.

The court explained that while the arrest associated with the vehicle came up, the defendant was still committing a

misdemeanor by driving with a suspended license which was verified. RP 106.

Regarding consent to search, the court noted the defendant did consent to search the vehicle and they were detained. RP 106. The hypodermic needles were in plain sight in the vehicle. RP 106. The court accepted that initially the defendant limited the search wherein the deputy informed the defendant he would impound the vehicle and apply for a search warrant. RP 106.

The court noted that the officer provided the defendant with *Ferrier* warnings and the court specifically found credible the officer's testimony that he gave those warnings. RP 107. Thus, even if the defendant had not initially changed their mind, they could have exercised their *Ferrier* rights to stop the search at any point. RP 107.

Relying on *State v. Smith*, 115 Wn.2d 775, 801 P.2d 975 (1990), the court held the fact that the deputy indicated they would impound the vehicle and apply for a search warrant does not clearly indicate any coercion. RP 107. The court recognized

that both counsel commented on how careful the officer was and indicated the officer knew he could not search if he did not have permission to search. RP 107. The court found it particularly persuasive that the key to the lock box was located on the defendant's key ring which the defendant gave to the deputy. RP 107. The court noted this tends to confirm the defendant's consent to the search. RP 107-108.

Defendant proceeded to trial where he was convicted of unlawful possession of a controlled substance with intent to deliver. CP 228.

## IV. ARGUMENT

### A. The Trial Court's Failure to Enter Written Findings of Fact and Conclusions of Law is Harmless Because the Oral Record is Sufficient to Facilitate Appellate Review

Pursuant to CrR 3.6(b), if a trial court conducts an evidentiary hearing regarding a motion to suppress evidence, the court is required to enter written findings of fact and conclusions of law. Still, it is harmless error if the trial court's oral ruling is sufficient to facilitate appellate review. *State v. Smith*, 145

Wn.App. 268, 274, 187 P.3d 768 (2008), *citing State v. Johnson*, 75 Wn.App. 692, 698 n.3, 879 P.2d 984 (1994); *State v. Riley*, 69 Wn.App. 349, 353, 848 P.2d 1288 (1993). Where the essential facts are not in dispute and the issue is strictly of a legal nature, formal findings and conclusions of law are less crucial. *State v. Tagas*, 121 Wn. App. 872, 875-76, 90 P.3d 1088 (2004).

The trial court erred by not entering written findings. However, the trial court explained its reasoning on the record and any error in not issuing a written order is harmless. *See* RP 105-107. This oral ruling adequately lays out the court's reasoning for denying Defendant's motion.

When viewed in conjunction with the testimony elicited at the hearing, the trial court's oral rulings on Defendant's motion is sufficient to facilitate appellate review. The facts supporting the trial court's rulings are provided by testimony elicited at the hearing and its reasoning for denying Defendant's motions is apparent from the record. RP 21-78. As the record is sufficient to permit appellate review of the trial court's rulings, any error in

failing to enter findings of fact and conclusions of law following the hearing was harmless and does not require reversal.

### B. The Court Properly Denied the Motion to Suppress Where the Officer's Investigation was not Pretextual but Based on Reasonable Articulable Suspicion of Misdemeanor Driving with a Suspended License.

Deputy Crawford's investigation was not pretextual. The investigation occurred only after Deputy Crawford discovered the defendant was driving with a suspended license, a criminal offense. Thus, this court should uphold the original courts finding.

Under the Fourth amendment of the United States Constitution, people have a right to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. CONST. amend. IV. Furthermore, Article I, Section 7 of the Washington Constitution states "no person shall be disturbed in his private affairs . . . without authority of law. WASH CONST. art I, § 7. Under both the Washington and U.S. Constitution, unlawful search and seizures are per se

unreasonable. *State v. Doughty*, 170 Wn.2d 57, 61, 239 P.3d 573 (2010). In Washington State, the term "private affair[s]" has been found to include automobiles and their contents. *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 455 (1986). The State bears the responsibility of showing a warrantless seizure falls into the narrow exception to the rule. *Id.* A *Terry* stop is an exception to the rule. *Id.* at 62. A *Terry* stop requires a well-founded suspicion that the defendant engaged in criminal conduct. *Id.* A court must evaluate the totality of the circumstances presented to the investigated officer. *Id.* The State has the burden of showing by clear and convincing evidence that the *Terry* stop was justified. *Id.*

A traffic stop, whether pretextual or not, is a "seizure" for the purpose of constitutional analysis, no matter how brief. *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999). A pretextual stop occurs when police pull over a citizen, not to enforce the traffic code, but to conduct a criminal investigation unrelated to the driving. *Id.* at 349. In determining whether a stop

is pretextual, the court should consider the totality of the circumstances, including the officer's subjective intent and the objective reasonableness of the officer's conduct. *Id.* at 359.

Here, the fact that Deputy Crawford was off duty with the Sheriff's Office is irrelevant. As *Graham* held, public policy is accelerated because "a police officer is a public servant or peace officer who has the authority to act as a police officer whenever the officer reasonably believes that a crime is committed in [their] presence, whether the officer is on duty or off duty." 130 Wn.2d 711, 723, 927 P.2d 227 (1996).

Looking at the totality of the circumstances surrounding the investigation, Deputy Crawford lawfully stopped the defendant. According to RCW 46.20.329:

> [a]ny police officer who has received notice of the suspension or revocation of a driver's license from the department of licensing may, during the reported period of such suspension or revocation, stop any motor vehicle identified by its vehicle license number as being registered to the person whose driver's license has been suspended or revoked.

RCW 46.20.329. The State presented evidence that Deputy Crawford was unaware of the occupant in the vehicle prior to their investigation. It was not until Deputy Crawford ran the license plate number through DLR on their computer that he learned the individual registered to the vehicle had a suspended license. Deputy Crawford testified it is a misdemeanor to operate a vehicle with a suspended license on a public roadway. RP 26. After confirming the driver's identity as the defendant, Deputy Crawford activated their emergency lights, performed the traffic stop, and advised the defendant they were being detained for driving with a license suspended. RP 27. *E.g., State v. Gaddy*, 152 Wn.2d 64, 93 P.3d 872 (2004) (police officer may arrest an individual without a warrant if probable cause to the driver having a suspended license); *State v. Johnson*, 155 Wn. App. 270, 278, 229 P.3d 824 (2010) (police officer has authorization to place driver under custodial arrest without warrant when officer has probable cause the driver is committing the offense of driving while license suspended or revoked); *State v. Phillips*,

126 Wn. App. 584, 109 P.3d 470, 472 (2005) (A DOL report of suspension supports articulable suspicion of criminal conduct sufficient to justify a brief investigatory stop).

In *State v. Johnson*, a police officer ran a routine check of a vehicles license place. *State v. Johnson*, 155 Wn. App. 270, 274, 229 P.3d 824 (2010). The license plate check uncovered the driver's license was suspended and they were placed under arrest. *Id.* The defendant argued the stop was pretextual. *Id.* at 276. The court, however, found the stop was lawful because driving while license suspended is considered a criminal offense. *Id*. at 278 Moreover, the court noted most pretextual stops follow a pattern of the arresting officer having suspicion of nontraffic related criminal activity and subsequently following a vehicle until a traffic infraction occurs, initiating the stop, and discovering evidence of an unrelated crime during a search. *Id.* at 280.

As in the current appeal, based on the DLR checks, Deputy Crawford had a reasonable articulable suspicion of the defendant

driving with a suspended license. In *Johnson* the officer only ran the license plate and then pulled the driver over. Here, Deputy Crawford not only ran the license plate, he then deliberately drove next to the defendant's vehicle to verify the identity of the driver with the photograph from the DLR check before stopping him. Additionally, the facts in this appeal do not follow the pattern of a pretextual stop. Nothing suggests Deputy Crawford had a suspicion of nontraffic related criminal activity until he ran the license plate number. Deputy Crawford did not follow the defendant waiting for a traffic infraction to occur. Deputy Crawford checked the license plate, drove alongside the defendant's vehicle to verify the identity of the driver, then immediately activated the emergency lights. Further, Deputy Crawford testified that had the license check not come back as driving with the license suspended, he would not have stopped defendant because he "wouldn't have had a reason to." RP 77.

Accordingly, this court should affirm the lower court's decision.

### C. The Defendant's Consent was Voluntary as there was No Coercion and the Officer Provided *Ferrier* Warnings, even though Not Required, and Defendant Reiterated Their Consent to a Search of the Vehicle, as well as the Lock Box.

The defendant's consent was voluntary. Although not legally required, Deputy Crawford took additional steps of providing *Ferrier* warnings, ensuring the defendant knew he could withdraw their consent to search the vehicle at any time. It is uncontested the defendant did not revoke their consent throughout the search. Thus, this court should uphold the search.

Generally, warrantless searches and seizures are per se unreasonable. *Ladson*, Wn.2d. at 379. There are, however, exceptions to the warrant requirement such as consent. *Id.* The State must prove three requirements to exhibit a consensual search: (1) the consent must be voluntary, (2) the person granting consent must have authority to consent, and (3) the search must not exceed the scope of consent. *State v. Reichenbach*, 153 Wn.2d 126, 131, 101 P.3d 80 (2004). Whether consent is voluntary is a question of fact and turns to the totality of the

circumstances, which can include (1) whether Miranda warnings were given prior to obtaining consent, (2) the degree of education and intelligence of the consenting person, and (3) whether the consenting person was advised of their right not to consent. *Id.* at 132. The State has the burden of showing consent was voluntarily given. *State v. Russell*, 180 Wn.2d 860, 871, 330 P.3d 151 (2014).

Where law enforcement informs a defendant they will impound their vehicle and request a search warrant if the defendant does not consent, they are not being coercive. *State v. Cherry*, 191 Wn.App. 456, 472, 362 P.3d 313 (2015), *citing State v. Smith*, 115 Wn.2d 790. "Bowing to events, even if one is not happy with them, is not the same thing as being coerced." *State v. Lyons*, 76 Wn.2d 343, 346, 458 P.3d 30 (1969).

Here, the defendant waived their *Miranda* rights prior to the search. Additionally, Deputy Crawford advised the defendant of their *Ferrier* warnings, which inform the person from whom consent is sought that they can "lawfully refuse consent to the

search and that they can revoke, at any time, the consent that they give, and can limit the scope of the consent." *State v. Budd*, 185 Wn.2d 566, 573, 374 P.3d 137 (2016). Deputy Crawford, however, was not required to advise the defendant of their *Ferrier* warnings. *Id.* (*Ferrier* warnings have consistently been limited to "knock and talk" procedures)*; State v. Witherrite*, 184 Wn. App. 859, 864, 339 P.3d 992 (2014) (It is best practice to give full Ferrier warnings before any consent search, but nothing in our constitution requires these warnings other than in "knock and talk" situations).

In *State v. Witherrite*, a deputy sheriff stopped the defendant for a traffic violation and had her perform sobriety tests. 184 Wn. App. 859, 860, 339 P.3d 992 (2014). The deputy received permission to search the defendant's car but did not inform the defendant of their right to refuse consent. *Id.* The deputy subsequently found a variety of drugs, and the defendant moved to suppress the evidence, arguing that her consent was invalid due to the absence of the *Ferrier* warnings. *Id.* The court

held that Ferrier warnings need not be given prior to obtaining consent of a vehicle. *Id.* The court reasoned that Washington has long held Ferrier warnings are only associated with homes as most deserving of heightened protection under our constitution. *Id.* at 864.

The facts in our case are distinguished from *Witherrite.* The fact that Deputy Crawford advised the defendant of their *Ferrier* warnings after receiving the defendant's initial consent is immaterial because they were not required to provide the warnings. But even after the defendant was informed of their *Ferrier* warnings, he again consented to the search of the vehicle and lockbox before Deputy Crawford searched the vehicle. Deputy Crawford even allowed the defendant to stand nearby and observe the search giving the defendant a chance to revoke or limit the search at any time.

Furthermore, during the suppression hearing, the court recognized that both counsel commented on how educated the deputy was regarding lawful searches. Consent was given to

search the vehicle absent the lock box. Deputy Crawford did not threaten the defendant, instead informing them that they were impounding the vehicle and would apply for a search warrant, at which time, the defendant consented to the search of the lock box by voluntarily taking the key off their key ring and handing the key to Deputy Crawford.

Defendant's claim Deputy Crawford's decision to inform defendant he could impound the vehicle and obtain a search warrant was coercive is equally meritless. *Smith* clearly holds such is not coercive. Further, *State v. Apodaca*, 67 Wn.App. 736, 739, 839 P.2d 352, *overruled on other grounds by State v. Mierz*, 127 Wn.2d 460, 901 P.2d 286 (1995), suggests that where grounds for obtaining a warrant exist, threats to obtain a search warrant do not invalidate consent. There, the court held that threats to obtain a warrant may invalidate consent if grounds for obtaining a warrant do not exist. *State v. Apodaca*, 67 Wn. App. at 739-740.

Here, grounds for a warrant clearly existed. Deputy Crawford saw in plain sight hypodermic needles in the driver side door, which defendant admitted using to ingest methamphetamine. RP 27, 30. At the time of the search, RCW 69.50.4013[2] criminalized simple possession of a controlled substance. Deputy Crawford's statement he would impound the vehicle and obtain a warrant was lawful and not coercive. "Bowing to events, even if one is not happy with them, is not the same thing as being coerced." *State v. Lyons*, 76 Wn.2d 346.

This court should find that the defendant's consent was voluntary.

## V. CONCLUSION

Based on the foregoing, the State requests the Court affirm the defendant's convictions and sentence.

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[2] On February 25, 2021, the Washington Supreme Court held RCW 69.50.4013 was unconstitutional. A later determination a statute is unconstitutional does not invalided an earlier finding of probable cause to believe a person violated the statute. *State v. Moses*, 512 P.3d 600 (2022).

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RESPECTFULLY SUBMITTED this 19th day of August, 2022.

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